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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 286

ALICE F. KELLER, Petitioner,

vs.

PAUL A. KELLER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI
and
BRIEF IN SUPPORT THEREOF.

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I. The Full Faith and Credit Clause, Article IV, Section 1, of the Constitution does not prevent a direct proceeding in one State to set aside a contested divorce granted in another on the ground that acts by the person obtaining the divorce, which he committed immediately after the divorce hearing, disclosed that he had practiced fraud on the Court granting the divorce, in representing, in his petition and testimony in that Court, that he had bona fide intent to live in that jurisdiction, while his true intent was merely to stay there long enough to secure a

divorce and then to return to the State from which he came, as the result of which the Court granting the divorce did not have jurisdiction of the subject matter, that is, the marital res... 15

(A) One cannot waive a right, whether pertaining to jurisdiction of a Court or any other situation, until he has knowledge of the facts which are the basis of the right; and, of course, one cannot waive the right to prove the acts of the other party which indicate the lack of domiciliary intent, before those acts of the other party have occurred. 21

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OCTOBER TERM, 1948.

No. .....

ALICE F. KELLER, Petitioner,

vs.

PAUL A. KELLER.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Alice F. Keller, a citizen of the United States and State of Missouri, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the opinion and judgment of the Supreme Court of Missouri, Division No. 1, rendered and entered on the 14th day of June, 1948, motion for rehearing or to transfer to said Court en banc denied on the 12th day of July, 1948, lately pending in said Supreme Court, in this case entitled Alice F. Keller (Plaintiff), Appellant, v. Paul A. Keller (Defendant), Respondent, No. 40,632 on the

docket of said Supreme Court of Missouri, affirming a judgment of the Circuit Court of the City of St. Louis, Missouri (Division No. 16), in said case in favor of Respondent, Paul A. Keller, and against your Petitioner, Alice F. Keller.

OPINION OF THE COURT BELOW.

The said opinion of the Supreme Court of Missouri, Division No. 1, in this cause, entitled Alice F. Keller, Appellant, v. Paul A. Keller, Respondent, appears on pages 16 to 19, inclusive, of the Printed Record filed herewith. Said opinion is reported in 212 S. W. (2d), at page 789.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was commenced in the Circuit Court of the City of St. Louis, Missouri, on June 27, 1945 (Printed Record, page 1).

The said Circuit Court sustained defendant's motion to dismiss plaintiff's petition, and dismissed plaintiff's cause of action on the basis of the facts stated in plaintiff's petition.

The important facts pleaded in the petition (R. 1-6) are, briefly, the following: Plaintiff and defendant were married in the State of Missouri in 1920, and have lived there ever since. In 1941, or about twenty-one years after their marriage, defendant, the husband, filed suit in St. Louis, Missouri, for divorce. Upon the trial of the case he was non-suited; that is, the trial judge indicated that he would enter a judgment dismissing the divorce suit, on the basis of the evidence heard, and the husband thereupon took a voluntary non-suit. Then he immediately left St. Louis, Missouri, and went to Nevada, where

he arrived six days after the unsuccessful trial of his divorce suit in Missouri, and on the same day instituted suit in Nevada for divorce. He did not allege any act suppcsed to have occurred in Nevada, but sought his divorce on the basis of cruelty and separation. The wife appeared in Nevada and opposed the divorce, but the Nevada Court granted the husband a divorce, not on the ground of cruelty, but solely on the discretionary ground that the parties had been living apart for a certain period of time since the husband left the wife. In his petition, as well as in his testimony at the hearing in Nevada, the husband represented to the Court that he intended to remain in Nevada as a resident of that State. Immediately after the divorce hearing in Nevada, however, the husband returned to St. Louis, Missouri, arriving in St. Louis within less than two weeks after the Nevada hearing, and he has continued to practice his profession at the same office that he maintained before making his trip to Nevada and has continued to live in the State of Missouri without interruption. His representations to the Nevada Court were a fraud on that Court, regarding his domiciliary intent, which induced that Court to grant him a divorce decree, and, since he had no bona fide domiciliary intent, the Nevada Court did not have jurisdiction to render the decree. However, the conduct of the husband immediately after the divorce hearing could not be presented to the Nevada Court as showing the fraud and lack of jurisdiction, since such acts and conduct occurred after the Nevada hearing. The petition, pleading these facts in Count 1, prays that the Nevada decree be set aside, and prays, further, in Count 2, that the Court thereupon award your petitioner, the wife, separate maintenance, said Count 2 further pleading the circumstances of their married life and the facts that the husband had left her without just cause and failed to adequately support her.

Defendant filed a motion to dismiss (R. 6), directed at the facts pleaded in the petition, asserting that the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution prevents the Missouri Court from setting aside the Nevada divorce decree on the basis of the pleaded facts which occurred after the Nevada hearing. The Circuit Court of St. Louis, Division No. 16, sustained this motion and, plaintiff in the suit electing to stand on her petition, final judgment was entered, dismissing plaintiff's petition and cause of action (R. 13). In proper time and in accordance with the law, plaintiff in said cause, your petitioner, took an appeal to the Supreme Court of Missouri (R. 14), where the Brief of the plaintiff, appellant therein, pointed out the same reason as is given in this Court why the position of the defendant's motion regarding the Full Faith and Credit Clause, Article IV, Section 1, is erroneous (R. 15), and the same was argued before that Court and submitted to it. The Supreme Court of Missouri, Division No. 1, nevertheless affirmed the judgment of the Circuit Court of the City of St. Louis, Missouri, Division No. 16 (R. 16). Within the time required by law, and in compliance with the rules of the Supreme Court of Missouri, appellant therein, your petitioner herein, filed her motion for rehearing or to transfer to the Supreme Court of Missouri en banc on June 25, 1948 (R. 20), which was overruled by said Court on July 12, 1948 (R. 21). Your petitioner immediately filed a motion in said Supreme Court of Missouri to stay the mandate pending application for certiorari, and, on July 15, 1948, said motion was granted (R. 21). Within the time required by the Rules of this Honorable Court, and in compliance with all requirements of the law, your petitioner has filed this, her Petition for Certiorari.

RULING OF SUPREME COURT OF MISSOURI.

In deciding the federal question presented by the petitioner herein, the Supreme Court of Missouri ruled as follows, in its opinion (R. 18-19):

> "To retry that issue would amount to ignoring the U. S. Const. Art. IV, Sec. 1. The question sought to be placed in issue by appellant's petition must be regarded as res judicata. The United States Supreme Court expressly so held in the case of Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518. Plaintiff now says the second Williams case 'qualified the authority of the Davis case as merely supporting the proposition that a court of one state cannot, under the Full Faith and Credit Clause, Art. IV, Sec. 1, attack the jurisdiction of a court of another state to render a divorce decree merely on the basis of events which occurred prior to the hearing in that other state, since the parties had an opportunity to present this to the court of that other state.' Plaintiff argues that the present petition pleads facts, which occurred after the Nevada trial, concerning defendant's return to Missouri and subsequent residence here, which it is claimed brings the case within the authority of Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366, and German Savings & Loan Society v. Dormitzer, 192 U. S. 125, 24 S. Ct. 221, 48 L. Ed. 373.
>
> "However, both of these were cases in which the defendant therein did not appear at the trial and contest the right of the plaintiff to obtain a divorce."
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> "We do not think the second Williams case means what plaintiff contends; and we think it recognizes that jurisdictional facts are res judicata where they

are actually contested in a trial in which both parties personally participate. To sustain plaintiff's contention that such facts are not res judicata, because of what happened after the trial, would mean that litigation of such issues would never end. There could always be subsequent evidence on almost any issue. Courts must necessarily decide issues on facts occurring before they determine them. What happened afterward in this case could be no more than cumulative evidence on the same issue of domicile that the court did decide."

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 (b) of the Judicial Code, 36 Stat. 1156, as amended by act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344 (b), providing for review by this Court, by certiorari, of final judgments in the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution or any treaty or statute of the United States, where the Federal claim is sustained, as well as where it is denied. The judgment of the Supreme Court of Missouri, Division No. 1, here sought to be reviewed was entered on the 14th day of June, 1948 (R. 16). Motion for rehearing or to transfer to the Court en banc was filed within the time required by, and in conformity with, the rules of said Supreme Court (R. 20), and said motion was denied by said Supreme Court on the 12th day of July, 1948 (R. 21), on which said date said judgment became final. The Supreme Court of Missouri, which entered the above judgment, was the highest Court of the State of Missouri in which a decision could be had in said cause. Said Court based its judgment in affirming the judgment of the Trial Court dismissing plaintiff's petition and cause, on the

claim of the defendant, that the Full Faith and Credit Clause, Article IV, Section 1, of the United States Constitution bars this proceeding to set aside the Nevada divorce decree involved herein. The following cases are thought to sustain the jurisdiction of this Court:

State Tax Commission v. Van Cott, 306 U. S. 511;
Longest v. Langford et al., 274 U. S. 499;
Brooklyn Savings Bank v. O'Neil, 324 U. S. 697;
Baltimore & Ohio R. R. Co. v. Kepner, 314 U. S. 44.

QUESTION PRESENTED.

Whether the Full Faith and Credit Clause of the Constitution prevents a direct proceeding in one state to set aside a contested divorce granted in another on the ground that acts by the person obtaining the divorce which he committed immediately after the divorce proceeding disclosed that he had practiced fraud on the Court granting the divorce, in representing, in his petition and testimony in that Court, that he had bona fide intent to live in that jurisdiction, while his true intent was merely to stay there long enough to secure a divorce and then to return to the State from which he came, as the result of which the Court granting the divorce did not have jurisdiction of the subject matter, that is, the marital res.

REASONS RELIED ON FOR GRANTING WRIT.

1. The Supreme Court of Missouri has decided a Federal question of substance, which is of public importance, in a way not in accord with applicable decisions of this Court, in that this Court, in the second case of Williams v. North Carolina, 325 U. S. 226, has drawn the following distinction: That matters which could be proven at the time of a divorce hearing (with reference to whether the residential

intent of the divorce suit plaintiff necessary to give that Court jurisdiction is genuine, or it is fraudulently represented merely to secure the divorce), are forever closed by the decree of that Court and, under the Full Faith and Credit Clause, Article IV, Sec. 1, cannot be considered by any other Court as the basis of setting aside that decree, in which situation the ruling of this Court in Davis v. Davis, 305 U. S. 32, applies; while, on the other hand, matters which could not be presented at the divorce proceeding are not barred, under the Full Faith and Credit Clause, Article IV, Section 1, from being considered by that or any other Court as the basis for setting aside the decree, in which situation the rulings of this Court in Andrews v. Andrews, 188 U. S. 14, and German Savings and Loan Society v. Dormitzer, 192 U. S. 125, apply. Where, as is pleaded in the present case, the conduct of the party obtaining the divorce, immediately after the divorce proceeding, is what discloses the fraud practiced by him upon the Court regarding his domiciliary intent, these are facts which could not be proven at the time of the divorce proceeding, and, therefore, under this distinction drawn by this Court, can be considered by the Court decreeing the divorce or by any other Court as the basis for setting aside the divorce so fraudulently obtained. This distinction is recognized by this Court again in the recent case of Sherrer v. Sherrer, 334 U. S. 343. The Supreme Court of Missouri, in the present case, failed to follow this distinction, and, instead, held that all matters pertaining to jurisdction are barred under the Full Faith and Credit Clause, Article IV, Section 1, from being considered by another Court than the one rendering the divorce decree, regardless of whether they are matters which could be proven at the divorce hearing or not, and therefore held that the right of petitioner in the present case, to prove the acts of the plaintiff in the divorce decree immediately after the divorce

hearing, is barred from being considered as the basis of her present suit to set aside the divorce decree.

2. The Supreme Court of Missouri has decided a Federal question of substance, which is of public importance, not heretofore directly decided by this Court, in that, while this Court has (by its decisions just discussed under Reason 1), decided the legal principles which sustain the right of a party to bring a direct suit to set aside a divorce on the ground that the acts of the party who obtained the decree immediately after the hearing, indicate that he practiced fraud on the Court in obtaining the decree, by misrepresenting his domiciliary intent; and, while this court has, by inference, sustained the right of a party to bring such a direct suit to set aside the decree, as distinguished from a collateral attack in another type of legal proceeding, in the recent cases of Sherrer v. Sherrer, 334 U. S. 343, and Coe v. Coe, 334 U. S. 378; nevertheless, this Court has never had before it a direct proceeding, as the present one, to so set aside a divorce decree, on such ground, and it is of public importance that this Court should pass on such a suit and directly declare that suits can be so brought to directly set aside such divorce decrees obtained by fraud which is disclosed by acts of the divorce plaintiff immediately after the divorce hearing.

PRAYER.

Wherefore, petitioners pray that a Writ of Certiorari be issued by this Honorable Court directed to the Supreme Court of Missouri, to the end that said Opinion and Judgment of said Supreme Court of Missouri, Division No. 1, in said case of Alice F. Keller, Appellant, v. Paul A. Keller, Respondent, No. 40632, in said Supreme Court, be reviewed by this Court as provided by law, and that, upon

such review, said judgment of said Supreme Court of Missouri be reversed, and that petitioner have such other relief as this Court may deem appropriate.

Respectfully submitted,

J. M. FEIGENBAUM,
(FEIGENBAUM & FEIGENBAUM),
Counsel for Petitioner.

IN THE

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OCTOBER TERM, 1948.

No. .....

ALICE F. KELLER, Petitioner,

vs.

PAUL A. KELLER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri, Division No. 1, in this cause, entitled Alice F. Keller, Appellant, vs. Paul A. Keller, Respondent, appears on pages 16 to 19, inclusive, of the Printed Record filed herewith. Said opinion is reported in 212 S. W. (2d), at page 789.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari herein, and, in the interest of brevity, are not repeated here, but are included herein by reference thereto. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Supreme Court of Missouri, Division No. 1, in its opinion in this cause (R. 16-19) erred:

1. In holding and deciding that the Full Faith and Credit Clause, Article IV, Section 1, of the United States Constitution bars your petitioner from maintaining this direct suit especially brought to set aside a divorce decree rendered in another state on the basis of acts and conduct of the divorce suit plaintiff immediately after the divorce decree, which acts and conduct indicated that he had obtained the decree by fraud in misrepresenting that he intended to be a resident of the state of the divorce decree, while the truth was that he intended to stay there just long enough to present his divorce suit, by reason of which lack of genuine domiciliary intent, the Court rendering the divorce decree lacked jurisdiction of the subject matter, the marital res.

2. In holding and deciding that this Court had not drawn any distinction, in its opinion in the case of Williams v. North Carolina, 325 U. S. 226, between events which occur prior to a divorce hearing and which, therefore, can be proven at the divorce hearing, on the one hand, and events which occur subsequent to the divorce hearing, and which, therefore, cannot be proven at the divorce hearing.

3. In holding and deciding that there is a distinction between the present case, in which the petitioner appeared in person to contest the divorce proceeding, and the case of Andrews v. Andrews, 188 U. S. 14, in which the divorce suit defendant appeared generally by filing a pleading denying the right of the divorce suit plaintiff to the divorce.

SUMMARY OF ARGUMENT.

I. The Full Faith and Credit Clause, Article IV, Section 1, of the Constitution does not prevent a direct proceeding in one State to set aside a contested divorce granted in another on the ground that acts by the person obtaining the divorce, which he committed immediately after the divorce hearing, disclosed that he had practiced fraud on the Court granting the divorce, in representing, in his petition and testimony in that Court, that he had bona fide intent to live in that jurisdiction, while his true intent was merely to stay there long enough to secure a divorce and then to return to the State from which he came, as the result of which the Court granting the divorce did not have jurisdiction of the subject matter, that is, the marital res.

Williams v. North Carolina, 325 U. S. 226;
Andrews v. Andrews, 188 U. S. 14;
German Savings & Loan Society v. Dormitzer, 192 U. S. 125;
Sherrer v. Sherrer, 334 U. S. 343;
Coe v. Coe, 334 U. S. 378.

(A) One cannot waive a right, whether pertaining to jurisdiction of a Court or any other situation, until he has knowledge of the facts which are the basis of the right; and, of course, one cannot waive the right to prove the acts of the other party which indicate the lack of domiciliary intent, before those acts of the other party have occurred.

Pence v. Langdon, 99 U. S. 578;
Globe Mutual Life Ins. Co. v. Wolff, 95 U. S. 326;
Bennecke v. Connecticut Mut. L. Ins. Co., 105 U. S. 355;
67 Corpus Juris, p. 300, Section 5.

ARGUMENT.

I. The Full Faith and Credit Clause, Article IV, Section 1, of the Constitution does not prevent a direct proceeding in one State to set aside a contested divorce granted in another on the ground that acts by the person obtaining the divorce, which he committed immediately after the divorce hearing, disclosed that he had practiced fraud on the Court granting the divorce, in representing, in his petition and testimony in that Court, that he had bona fide intent to live in that jurisdiction, while his true intent was merely to stay there long enough to secure a divorce and then to return to the State from which he came, as the result of which the Court granting the divorce did not have jurisdiction of the subject matter, that is, the marital res.

In the last case of Williams v. North Carolina, 325 U. S. 226, this Court held that, where individuals had gone to Nevada, and each had there secured a divorce from the respective spouse of each, and immediately returned to his or her home in North Carolina after the divorce hearing, a North Carolina Court was not prevented, by the Full Faith and Credit Clause, Article IV, Section 1, of the United States Constitution, from considering whether such conduct proved that the Nevada Court lacked jurisdiction to enter the decree in each case. During the course of the opinion, the Court reviewed the law in this field of bona fide residential intent of the plaintiff, as it affects the jurisdiction of a Court to render a divorce decree, and, among other principles announced by this Court, during the course of the opinion, laid down a principle of law, with respect to contested divorces, that distinguished between facts which could be proven at the time of the divorce hearing and facts which could not be proven at that time. It cites the cases of Andrews v. Andrews and

German Savings and Loan Society v. Dormitzer, on the one hand, and Davis v. Davis, on the other hand, and reconciles the rulings in these decisions by qualifying the authority of each case to the circumstances involved, so that the distinction is that those matters which could be proven as showing the domiciliary intent or lack of intent and could be presented to the Court at the time of the divorce hearing are barred by the finding and judgment of that Court, in support of which the Davis case is authority, and, on the other hand, those matters which could not be proven and presented to the Court at the time of the divorce hearing, as, in the present case, acts of the divorce plaintiff which occurred after the divorce hearing, are not barred by the finding and judgment of the Court granting the divorce, in support of which principle the Andrews and Dormitzer cases are authority.

In the case of Andrews v. Andrews, 188 U. S. 14, the facts briefly were that a man who lived in Massachusetts went to South Dakota to get a divorce. The wife received notice, appeared by counsel and filed an answer, denying the husband's claimed ground for divorce and denying that he is a South Dakota resident. Thereafter they settled the divorce suit and she let him obtain a divorce in South Dakota. Then the husband returned to Massachusetts, where he married someone else and he remained until his death. Upon his death, each of his two wives petitioned in Massachusetts to be appointed administratrix of his estate, each claiming to be his lawful widow. The first wife claimed that, since his conduct in immediately returning to Massachusetts after securing the divorce in South Dakota proved his lack of genuine intent to be a resident of South Dakota, the South Dakota Court lacked jurisdiction of the subject matter, the marital res. The Massachusetts Court upheld her position, and so did this Honorable Court, stating, 188 U. S., l. c. 40:

"Nor is there force in the suggestion that because, in the case before us, the wife appeared, hence the South Dakota court had jurisdiction to decree the divorce. The contention stated must rest on the premise that the authority of the court depended on the jurisdiction of the parties, and not on its jurisdiction over the subject matter — that is, bona fide domicil, irrespective of the appearance of the parties. Here again the argument, if sustained, would involve the overruling of Bell v. Bell and Streitwolf v. Streitwolf. As, in each of the cases, jurisdiction was conferred, as far as it could be given, by the appearance of the plaintiff who brought the suit, it follows that the decision that there was no jurisdiction because of the want of bona fide domicil was a ruling that, in its absence, there could be no jurisdiction over the subject matter, irrespective of the appearance of the party by whom the suit was brought. But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject matter not resting on consent includes, necessarily, the want of power of both parties to endow the court with jurisdiction over a subject matter, which appearance or consent could not give."

The language used by the Court in this Andrews case might appear to permit a Court of one State to set aside a divorce decree of another State on the basis of acts which occurred prior to the divorce hearing, as well as those which occurred after it. However, the authority of the ruling has been qualified and limited by this Court in the last Williams case, discussed above, to acts which have occurred since the divorce hearing.

In the case of German Savings & Loan Society v. Dormitzer, 192 U. S. 125, in which the Court followed the

Andrews ruling, the facts briefly were that a divorce decree rendered by a Kansas Court was held void by a Court in the State of Washington on the ground that the divorce plaintiff had not been a bona fide resident of Kansas, and this Court upheld the right of the Washington Court to declare the Kansas decree void, even though the record indicated an appearance by the divorce defendant in the Court that granted the divorce.

On the other hand, in the case of Davis v. Davis, 305 U. S. 32, the facts briefly were that a District of Columbia Court had decreed separation and support for a wife and daughter. The husband went to Virginia and, after some time had elapsed, sued for divorce. The wife appeared there only to contest his bona fide Virginia residence, which issue the Court found in his favor, and the Court subsequently granted him a divorce, awarding support for the child but no alimony for the wife. Then the husband filed a motion in the District of Columbia Court, requesting that the previous order for support be vacated, and, in accordance with the Virginia divorce decree, that support be awarded for the child but terminated for the wife. The District of Columbia Court refused to follow the Virginia decree and thereafter this Honorable Court held that the District of Columbia Court was bound to give full faith and credit to the Virginia decree and grant the husband's motion. In the District of Columbia Court, counsel for the wife, in opposing the motion to modify, offered to prove only the circumstances under which the husband went to Virginia but nothing as to what his conduct was **after** the Virginia divorce hearing, as is indicated by the following portion of the opinion of this Honorable Court, 305 U. S., l. c. 38:

> "Then counsel for respondent applied for time to secure her attendance and that of witnesses who, as he said, would give testimony that petitioner went to

Virginia for the sole purpose of getting a divorce, and that he never became a bona fide resident there. Petitioner's counsel admitted that, if present, respondent and the witnesses referred to would so testify, but insisted that the testimony would be incompetent. Respondent offered no other evidence. The trial court denied the application."

In the opinion of this Davis Case, just as in the Andrews opinion, broad language was used by the Court, which might indicate that the ruling of the Court applied to cases where acts subsequent to the divorce hearing were involved, as well as cases in which events solely prior to the divorce hearing were involved. However, the Court, in the last case of Williams v. North Carolina, above discussed, limits the authority of this Davis case to situations where, as in that case, the facts involved events which occurred prior to the divorce hearing, rather than, as in the present case, where the acts of the divorce plaintiff immediately after the hearing are involved. The Court indicates this distinction and limits the authority of the Davis case to events which could have been so presented at the time of the divorce hearing, in the following statement made by the Court, in the opinion in this last Williams v. North Carolina decision, 325 U. S., l. c. 230:

"It is one thing to reopen an issue **that has been settled after appropriate opportunity to present their contentions has been afforded** to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. Forsyth v. Hammand, 166 U. S. 506, 517, 17 S. Ct. 665, 670, 41 L. Ed. 1095; Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 30, 37 S. Ct. 492, 493, 61 L. Ed. 966; **Davis v. Davis,** supra." (Emphasis ours.)

This distinction between events which could be proven at the time of the hearing and those which occurred subsequent to it, and which, therefore, could not be proven at the time of the hearing, drawn by this Court in the last Williams v. North Carolina case, is followed in the recent cases of Sherrer v. Sherrer, 334 U. S. 343, and Coe v. Coe, 334 U. S. 378. These last mentioned two decisions also draw a distinction between a collateral attack on a divorce decree made, as in those cases, during the course of a suit brought primarily for another purpose, and a direct attack, as the present suit, for the primary purpose of directly setting aside the divorce decree for fraud. In the Sherrer case the collateral attack on the divorce decree was made in the course of a suit affecting real estate. In the Coe case the collateral attack was made by filing a motion to enforce a prior separate support decree. In the Coe case, the Court draws the distinction between direct and collateral attacks, in the following language, in the opinion, 334 U. S., l. c. 384:

> "In the Sherrer case, we concluded that the requirements of full faith and credit preclude the courts of a sister State from subjecting such a decree to collateral attack by readjudicating the existence of jurisdictional facts. That principle is no less applicable where, as here, the party initiating the collateral attack is the party in whose favor the decree was entered."

In the Coe case, of course, the facts are not pertinent to the present case, so far as any similarity to the conduct of the parties is concerned, since the wife who was there complaining of the lack of of jurisdiction of the divorce Court had herself filed an Answer in that Court admitting the residence of her husband and jurisdiction of the Court and had eventually secured the divorce herself in that Court.

However, the facts in the Sherrer case are important as bearing on the issue of the conduct of the parties, since it shows a case in which the sole acts of the divorce plaintiff which were later criticized in another Court, were acts that occurred prior to the divorce hearing, in complete contrast with the present case, involving acts which occurred after the divorce hearing. In the Sherrer case, the plaintiff who obtained the divorce decree lived in the State with her children after the decree, remarried there and never left the State of the divorce decree for a few months after the hearing. The Court, in stressing the rule announced in the last case of Williams v. North Carolina, that acts which could have been presented at the time of the divorce hearing, are forever barred from being presented thereafter in another Court, used the following language, during the course of the opinion, 334 U. S., l. c. 352:

> "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered."

I. (A) One cannot waive a right, whether pertaining to jurisdiction of a Court or any other situation, until he has knowledge of the facts which are the basis of the right; and, of course, one cannot waive the right to prove the acts of the other party which indicate the lack of domiciliary intent, before those acts of the other party have occurred.

If this Court had not drawn a distinction between acts of a divorce plaintiff which occurred prior to the hearing and those which occurred after the hearing, and had not

declared that those which occurred after the hearing are not waived by the trial of the divorce suit, it would be contrary to a fundamental principle of law, that, in order for there to be a waiver of any legal right, whether it concerns the jurisdiction of a court or the right to prove acts of the other party affecting such jurisdiction, or of any other legal right, there must be knowledge of the party who is claimed to have waived the right; and, of course, there can be no knowledge of acts prior to the time when they occur.

This principle of law is stated in 67 Corpus Juris, p. 300, Section 5, as follows:

> "Knowledge of the facts, knowledge of the existence of the right, benefit, or advantage in question, or of the facts on which it depends, and of the circumstances in which the parties were placed at the time of the alleged waiver, and knowledge of his right and of facts which would have enabled him to take effectual action for its enforcement, on the part of the party claimed to have made the waiver is an essential prerequisite to the relinquishment of his right, benefit, or advantage. No one can be said to have waived that which he did not know or should have known;" (citing in footnotes at the bottom of page 301, the following decisions of this Court: Pence v. Langdon, 99 U. S. 578, 581; Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 333; and Bennecke v. Connecticut Mut. L. Ins. Co., 105 U. S. 355, 359).

The same principle of law waiver is stated differently, by this Court, in the following language in the opinion of Pence v. Langdon, 99 U. S., l. c. 581:

> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The

terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do."

This principle, applicable to the present case, is only founded on what is obvious. It would be unfair to a divorce defendant to hold that she has waived the right to prove events which occur **after** the divorce hearing, since there would be no way for her to know, and certainly no way for her to prove at that time, what the divorce plaintiff is going to do in the future. There is no way to know, with any degree of certainty, and certainly there is no way to prove, whether a divorce plaintiff is going to remain in the State granting the divorce and carry on the every day affairs of his life there, or he is going to immediately return to the State from which he came, and carry on his daily life there.

CONCLUSION.

The decisions of this Court discussed above, in the argument, have amply established the right of a divorce suit defendant to bring a direct suit to set aside a divorce decree for fraud, in the Court rendering the decree or in the Court of any other jurisdiction where the parties may reside and where jurisdiction of such a suit would be, where the fraud is demonstrated by the conduct of the divorce suit plaintiff immediately after the divorce hearing. However, in the interest that the law applicable to this field of jurisdiction and domicile in divorce suits be further clarified by this Court, and in order that the Courts throughout the land may be certain of the right of a party to bring such a direct suit, it is of great public interest that

this Court grant Certiorari in this case and specifically declare the right of a plaintiff to bring such a suit, since this is a matter affecting the lives of many people, with regard to their domestic relations.

It is therefore respectfully submitted that the Writ of Certiorari should be issued as prayed.

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